

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARIANA GARCIA)	
Claimant)	
V.)	
)	Docket No. 1,068,563
FARMLAND FOODS, INC.)	
Respondent)	
AND)	
)	
SAFETY NATIONAL CASUALTY CORPORATION)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the April 13, 2015, Award Nunc Pro Tunc by Administrative Law Judge (ALJ) Ali N. Marchant. The Board heard oral argument on August 4, 2015, in Pittsburg, Kansas.

APPEARANCES

R. Todd King, of Wichita, Kansas, appeared for the claimant. Travis L. Cook, of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found claimant did not recklessly violate respondent's safety rules, and therefore claimant is entitled to workers compensation benefits for injuries arising out of and in the course of her employment with respondent on October 30, 2012. The ALJ relied on the opinions of Dr. Murati and Dr. Melhorn and awarded claimant an 11 percent impairment to the right upper extremity at the forearm.

Respondent appeals, arguing the Award should be reversed and claimant denied compensation because she recklessly violated respondent's safety rules. In the alternative, should the Board find claimant is entitled to compensation, claimant should be

entitled to no more than a 12 percent functional impairment to the right hand, not the forearm.

Claimant has not filed a brief, but presumably requests the Award be affirmed.

Issues on Appeal:

1. Is claimant precluded from receiving benefits pursuant to K.S.A. 44-501(a)(1)(D)?
2. If claimant is entitled to benefits, what is the nature and extent of her functional impairment?

FINDINGS OF FACT

Claimant began working for respondent on July 4, 2004. Her current position is as a lead person in the slicing department. She has been in this position for around seven years. Claimant's job duties include making sure the lines run and assisting employees, which at times involves lifting, carrying, pulling and gripping around 30 to 40 pounds.

On October 30, 2012, claimant got her right hand caught between a sprocket or motor which propelled a conveyer belt, and suffered injury. Claimant testified she had been grabbing empty packages from the conveyer belt to put in the trash and, as she did, her glove was caught by the conveyer belt and her thumb and hand were pulled in the sprocket and motor. Claimant testified there was an excessive amount of empty packages moving down the conveyor, so she was grabbing them when her thumb got caught and her hand pulled in. The line had to be stopped and the belt removed so her hand could be freed.

Claimant's supervisor at the time of the accident was Jose Ramirez. At the time of the accident, claimant's schedule was 5:30 a.m. to 4:30 p.m. Claimant indicated she had been reprimanded one time in 2007 or 2008 for falsification of a document by failing to include her name on a meat log when she was training a machine operator.

Claimant acknowledged receiving training from respondent on its lock out/tag out policy, and understood the policy to mean the machine was to be locked out and tagged out to make sure it could not run before working on it. Claimant testified the October 30, 2012, incident did not require the lock out/tag out procedure, because it was not necessary to lock out/tag out the belt just to remove material that was moving along the conveyor belt. She indicated taking empty packages off the line was something she had done more than once before the accident.

Claimant testified that before the accident, she was responsible for presenting safety information at employee meetings. Therefore, she is very familiar with the lock

out/tag out procedure. She continues to do this once in a while when she fills in for her current supervisor, Stephanie Hogue.

Claimant was disciplined after the accident with a three-day suspension for a lock out/tag out violation. This suspension was given by the safety manager, Grace Varva, and the assistant manager, Samantha Martinez. Claimant disagreed with the suspension because she does not believe she was doing any maintenance on the conveyor and was not performing anything that fell under the rules of lock out/tag out. She testified that if a worker had to stick his or her hand in a machine or was doing maintenance, then lock out/tag out had to be followed. But she was grabbing plastic off the conveyor, the same conveyor they grab packages off of to check dates, so lock out/tag out was not necessary. When claimant contacted Matt Rohr, the union steward, the only advice claimant was given was that if she did not agree with the suspension, do not sign the papers. Claimant did not fight the suspension because she was too worried about her hand.

When claimant returned to work after her suspension, she was put on light duty and received training for lock out/tag out. This was the last time she received training. It was clarified that lock out/tag out was to be followed when empty cartons are being produced on the line. Once the cartons are removed, the line can start again. Claimant indicated the prior training was not that specific. It had been at least two to three years before the accident that claimant received training for lock out/tag out.

Claimant's injury was surgically repaired by Dr. Melhorn. After surgery, claimant had pain in her thumb and her ring finger. She had little feeling in her other fingers. She also had pain near her wrist and sometimes experienced shooting pain to her elbow. Since the accident, claimant has less motion in her thumb and loss of strength in her hand. She also feels her arm is weaker. Claimant healed from surgery and Dr. Melhorn released her to return to work with no restrictions on February 7, 2013. Claimant returned to her regular job duties with respondent. Claimant met with Dr. Murati in March 2014. At the time of claimant's April 2014 deposition, claimant was not having problems doing her job and had no disciplinary problems.

Claimant testified she is not 100 percent and continues to do home physical therapy exercises as needed. Claimant notices strength problems and stiffness in her hand when she opens a bottle of water or uses scissors. She has reoccurring numbness, tingling and pain in her hand, depending on the weather. When claimant's symptoms flare, she takes ibuprofen and rests her hand.

Claimant indicated that, before the accident, there were never any safety guards on the conveyor belt where there were gaps, but they have been added since the accident. Claimant continues to pull packages off the line as she did the day she was injured, but now there is a guard on the belt. The lock out/tag out procedure did not change. Claimant testified that she has seen all of the machine operators remove plastic from the conveyor in the same way she did on the day of the injury.

Q. In the course of ten years doing this job, have you had packaging bunch up like that before?

A. Yes.

Q. Had you been trained by somebody on how to deal with that situation earlier on in your career when you were being trained how to do this, did somebody show you how to deal with that situation?

A. Yes.

Q. Were you -- do you remember who instructed you back then?

A. No, I don't.

Q. In fact, all aspects of your job, you've been trained or shown or trained by somebody else at some point how to do that right?

A. Yes.

Q. And if there is some sort of problem, you've been shown or trained by somebody on how to deal with that problem?

A. Yes.

Q. The problem with packaging backing up like that and it needing to be removed, you remove it by hand?

A. Yes.

Q. And do all the other employees do it the same way?

A. Yes.

Q. Did your supervisor before you do it that way?

A. Yes.

Q. Is that something that you hide from your supervisors or do they observe people doing that?

A. They observe people doing that.

Q. That's the accepted way to do it, isn't it, within the company?

A. Yes.

Q. So October 30th of 2012 was not the first time that you have done that?

A. Yes.

Q. Is that true? That's right, correct?

A. Yes.

Q. Had you ever been told by a supervisor prior to October of 2012, prior to getting hurt, had you ever been told by a supervisor, hey, don't do it that way?

A. No.

Q. Had you ever been written up for doing it that way?

A. No.

Q. Had anybody else ever been written up for doing it that way?

A. No.

Q. Had anybody else ever gotten in trouble for doing it that way?

A. No.

Q. There really isn't a question of whether there is a lockout/tagout procedure; there is one right?

A. Yes.¹

Claimant indicated there are other situations when the line is not working right and she has to reach on top of the conveyor to retrieve something and practices lock out/tag out to do it. Claimant contends what happened to her hand could have happened anywhere along the conveyor belt.

Aaron Stegman, a safety manager for respondent, testified his primary job duties are to ensure the safety of the employees and develop new methods and programs to increase safety. Mr. Stegman defined lock out/tag out as "any time that an employee needs to work on any type of equipment, whether that be a product jam-up, a malfunction of the equipment, a changeover, any time they're going to tear down for cleanup, they need to lock out the equipment, which would be energize and release all energy sources and

¹ R.H. Trans. at 42-44.

stored energy.”² This means the machine is unable to move if it is properly locked and tagged out because it has no power source.

Mr. Stegman testified the lock out/tag out policy is strictly enforced and the first violation is subject to an immediate three-day suspension. A second violation, if it occurs within five years of the first violation, results in immediate termination.

Mr. Stegman was asked, when it came to lock out/tag out, what the phrases point of operation or pinch point meant. He indicated point of operation is anywhere on a machine or any moving part that could create a hazard as far as the employee getting hurt. He indicated pinch point was similar, i.e., a point where an employee could possibly pinch themselves or their frock or their personal protective equipment (PPE) could get caught.

Respondent had two types of employees in terms of safety training, typical employees and red hat employees. Typical employees receive training annually on the machines they are expected to operate. Red hat employees receive training on all of the specific equipment in their department and are expected to lock out/tag out if necessary. Claimant was a red hat employee.

Mr. Stegman was not with respondent at the time of claimant’s accident. He started work in April 2013, but he received the accident report and other information regarding claimant’s accident. Mr. Stegman testified the incident described in the accident report is a situation where lock out/tag out should have been implemented.

Mr. Stegman testified the line claimant was injured on is still in production, but the actual conveyor is not. After the accident, a guard was put on the line where claimant was injured to prevent jam-ups and so the product cannot go into the sprockets as easily. The purpose of the guard is to produce a better flow of product. He testified if an employee’s hand got caught in the belt, it will run in the direction of the belt.

Mr. Stegman received details of the accident from Ryan Dallinghaus. He confirmed that the three day suspension claimant received after the accident was consistent with the policy for violating lock out/tag out. Mr. Stegman testified that if someone is going to get their hand stuck where claimant’s did, they would have to lift the belt and put their hand down where the sprockets and the drive shaft are.

Mr. Stegman acknowledged that, although he is in charge of the safety of all of the employees in the plant, he could not say what the supervisor directly above claimant would allow in certain situations. Respondent and claimant’s conflicting opinions in this matter were partially highlighted during Mr. Stegman’s deposition:

² Stegman Depo. at 6.

BY MR. SCHAEFER:

Q. Okay. So my point is how does a belt pull a hand under? How can it pull it towards that sprocket?

A. Again, the only way the belt could is depending on how you grasp it.

Q. So if you're reaching underneath it, could it?

A. Yes.

MR. SCHAEFER: So I guess I'm concerned. How are you saying her hand got under there, Todd?

MR. KING: There is a gap between the edge of the belt and the wall, and in that gap you can see these shafts and sprockets and everything else. So if her fingers go in between the belt and the wall, she can hit those sprockets and shafts and pinch points that can grab her glove the same way that it grabs the packaging.³

Jose Ramirez, a production supervisor, has worked for respondent for 37 years. Mr. Ramirez's job is to make sure production, safety, food safety and environmental safety, goes right. He is currently working the third shift. In October 2012, Mr. Ramirez was working the first shift in the slicing department, with claimant. Mr. Ramirez indicated he was aware claimant was hurt at work, as he was her supervisor at the time, but did not know she filed a workers compensation claim until he was called to testify.

Mr. Ramirez testified he and claimant were in the office when a call came in over the radio and they went down to the line to make sure everything was still running. They arrived to find product piling up at the end of the line. Mr. Ramirez did not see what happened to claimant, indicating he was on the radio calling the warehouse for some bottom film. He testified it is not routine for the employees to pull materials off the line when they start to pile up. He testified the machine is to be stopped and the guards taken off before reaching into the machine to adjust the film.

Mr. Ramirez indicated lock out/tag out is needed any time you need to get your hands into the production machine. He identified a pinch point as where you can get your hands in and try to unjam the film. He also testified you can get hurt easily doing this, so lock out/tag out should be used if you are putting your hand into the pinch point area. He testified that no matter what the problem, lock out/tag out needs to be followed and everyone on the line must be told, because the procedure removes power from the line. Mr. Ramirez testified that lock out/tag out is strictly enforced and everyone receives training on the procedure and when to use it.

³ *Id.* at 41-42.

Mr. Ramirez testified he didn't initially order a lock out/tag out when he arrived at the problem belt because, when he arrived, he was not sure of the problem. He also testified claimant should have used lock out/tag out procedure. However, he could not explain why claimant would have automatically used lockout/tag out when they arrived at the same time and she didn't know what the problem was either.⁴

The machine had to be stopped and the conveyor belt taken apart to get claimant's hand out. It is Mr. Ramirez's impression that claimant had to be reaching into the conveyor belt, based on the location of the package she was trying to remove. The package claimant was attempting to remove was on the far side of the belt, away from her. He didn't actually see claimant reach her hand under the belt.

Mr. Ramirez indicated routinely removing material from the top of the conveyor belt when the material is piling up on top of a conveyor, is not a lock out problem. Lock out is used when material is stuck under the conveyor belt. Finally, Mr. Ramirez indicated it is impossible for claimant to have been pulled all the way across the belt, so it is his conclusion that she reached across under the conveyor belt, lifted up the conveyor belt, reached across to get the package and her hand was pulled in.⁵

Connie Stone, currently environmental process safety management (PSM) and sustainability coordinator for Smithfield Farmland Foods, has been employed by respondent for 12 years. In October 2012, Ms. Stone was a safety technician/safety professional and did all of the safety training, which included training employees in lock out/tag out. Ms. Stone agreed the lock out/tag out policy is strictly enforced.

Ms. Stone testified lock out/tag out means everyone is notified that you are going to lock out the machine and then you do so and do whatever you need to. This procedure is required when performing any major maintenance or, if lifting or moving a guard or putting your hand in the point of operation, which is anywhere the equipment moves. Ms. Stone testified the lock out/tag out procedure to remove a jammed package should, at most, take a couple of minutes. She indicated that lock out/tag out is used because, if it is not, once a jam is cleared of an obstruction, the machine would automatically start going again, which would be dangerous for those working with the machine. Ms. Stone admitted that because she was not present at the time of the accident to see how much of the package was stuck in the machine, she couldn't say if it could have been picked out without getting close to the rollers.

⁴ Ramirez Depo. at 18.

⁵ *Id.* at 37-38.

Ms. Stone first learned of claimant's accident when the accident report was completed. She indicated, based on the description of the accident in the report, lock out/tag out was required and should have been performed.

Ms. Stone testified:

The conveyor -- if it was jammed, it stopped the conveyor. If the conveyor was stopped and she reached in, she's reaching into point of operation; soon as she reached, whatever it was she was grabbing, that conveyor would have started up because it was not locked out. It would have been definitely a point where we -- would have been a point of operation, and it should have been locked out prior to putting her hand in that situation.⁶

Ms. Stone testified that removing a package off the top of the conveyor does not require lock out/tag out. Ms. Stone acknowledged at times there might be a gap between the conveyor and the side of the belt. In those situations, they would review the situation to determine whether a guard was necessary. After claimant's accident, a guard was placed on that belt in the area where claimant was injured.

Ms. Stone was asked to watch a video⁷ of the belt in question. She acknowledged the belt had a gap on the side. Additionally, as the belt moved along the track, it slid back and forth on the track with the gap on the sides changing, depending on the motion of the belt. She agreed it was possible for a person who stuck their finger in that gap, to get caught in the rollers.⁸

Wesley Brown, a motive power operator for respondent, testified he is familiar with the machines as he used to be a floor mechanic. As a mechanic Mr. Brown would repair, set up or tear down any line on the floor. He understood lock out/tag out policy to be a safety program to prevent anybody from being hurt by a machine that has stored energy or is on line directly. The lock out/tag out procedure takes energy away from the machine and it will not run.

Mr. Brown testified he repeatedly received safety training, which included training on lock out/tag out. He testified he and claimant have worked together for almost 11 years and he used to interact with her daily when he was a floor mechanic. Mr. Brown testified he has seen claimant lock out/tag out a machine, so she knows how to do it. He was not present on the day of claimant's accident.

⁶ Stone Depo. at 13.

⁷ Stegman Depo., Ex. 1.

⁸ Stone Depo. at 26.

Mr. Brown testified that if you do not lock out to shut the machine down, your hand could get stuck. He also testified he had witnessed some of the workers lifting the belt up and grabbing packages out of the drum motor, and when they get caught they are warned because it is a extremely serious lock out/tag out violation. If an employee gets two lock out/tag out violations, their employment is terminated. Mr. Brown also acknowledged that if more of a package is sticking up above a belt than under, you can grab that and pull it free without using lock out/tag out.⁹ He indicated that for claimant to be injured as she claimed, she would have had to lift the belt and reach down inside the drum motor.

Mr. Brown testified that he had seen other people lifting the belt and reaching under to free a package which was stuck in the drum motor which runs the belt. Those people were then warned. That type of activity would absolutely require a lock out/tag out. This type of activity occurred several years prior to claimant's accident. He agreed that over the last five years, the lock out/tag out has been strictly enforced by respondent. During cross examination, Mr. Brown agreed that if over half of the package was sticking above the conveyer belt, then claimant would have been able to grab the package without locking out the belt. However, Mr. Brown was unable to accurately identify the place where claimant's hand was actually caught.

Claimant met with J. Mark Melhorn, M.D., on October 30, 2012, for evaluation of her right hand. The initial diagnosis was a complex wound, right hand and wrist complex. He testified a majority of the injury involved primarily the hand-thumb area. Upon examination, Dr. Melhorn determined surgery was required and he performed surgery to repair claimant's hand on that date.

Dr. Melhorn met with claimant for 10 followup visits post surgery. On November 16, 2012, he noted complaints at the level of the wrist, diagnosing Neuropraxia. The pain drawing from that date indicated aching/pain on the top side of the right wrist. Many visits do not indicate wrist involvement. Claimant's primary complaints seem to focus primarily around the right thumb and the ring and little fingers. The December 27, 2012 pain drawing contained no indication of wrist involvement.

Claimant was found to be at maximum medical improvement on February 7, 2013. Claimant's final pain drawing indicated some aching at the right hand, near the wrist. Dr. Melhorn assigned claimant a 12 percent permanent partial impairment to the right hand, under the 4th Edition of the *AMA Guides*. He did not feel claimant was in need of permanent restrictions. Dr. Melhorn testified that had he found anything wrong with claimant's wrist he would have noted it.

Claimant met with Pedro Murati, M.D., for an examination on March 12, 2014, at the request of her attorney. Claimant complained of difficulty opening jars due to right hand

⁹ Brown Depo. at 25.

weakness; pain in the right wrist with cold weather; numbness and tingling in the right palm; and less range of motion in the right thumb. Claimant reported her hand got caught in a conveyor belt and a sprocket cut the inside of her thumb and the outside of her pinky. Claimant had surgery with Dr. Melhorn to treat her injuries.

Dr. Murati found claimant to be status post repair of laceration hypothenar area abductor digiti minimi quinti, flexor digitorum quinti, opponens digiti quinti and multiple small laceration soft tissue which included right thumb FPL, right thumb A1 pulley and right thumb MCP volar plate. In layman's terms, claimant had a bad cut on her hand going into her forearm area.¹⁰ He opined this was related to the October 30, 2012, work-related injury with respondent. Dr. Murati recommended yearly followup for the right hand in case complications ensued. He assigned a permanent restriction of no heavy grasping more than 40 kg with the right hand in an eight hour work day. He assigned the following impairments: 2 percent right thumb impairment for loss of range of motion (1 percent right upper extremity); 5 percent upper extremity impairment for allodynia, and 10 percent upper extremity for loss of grip strength. These values combine for a 16 percent impairment to the right upper extremity at the level of the forearm.

Dr. Murati opined claimant sustained a work-related accident which resulted in right hand pain. He noted claimant had no significant preexisting injuries related to her current diagnoses. He noted she has significant clinical findings and diagnoses consistent with her described accident at work. He opined claimant sustained enough permanent structural change in the anatomy of her right upper extremity which caused pain necessitating treatment on the date of the injury. Therefore, under all reasonable medical certainty and probability, the prevailing factor in the development of her conditions is the accident at work.¹¹

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501(a)(1)(D) states:

(D) the employee's reckless violation of their employer's workplace safety rules or regulations; or

K.S.A. 2012 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable

¹⁰ Murati Depo. at 6.

¹¹ *Id.*, Ex. 2 at 4.

to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(d) states:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1)(2)(B) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

Respondent strongly contests claimant's right to benefits in this matter due to claimant's alleged violation of respondent's safety rules and regulations regarding lock out/tag out procedures when working on or near moving equipment. Claimant contends the accident where her glove and hand were caught in a moving conveyer and pulled into the lower working parts of the conveyer occurred as the result of her simply grabbing an empty package partially under the belt, but not so far as to require a lock out/tag out. The record contains conflicting testimony on exactly where claimant's injury took place. It was on conveyer 8, but it is unclear as to the exact spot of the incident. Claimant testified that the incident occurred when she tried to remove the package from the side of the belt. Respondent's witnesses speculated that claimant must have raised the belt and reached under to retrieve the package, which would have been a violation of the policy. The videos placed into evidence do not clearly identify the exact spot of the accident. As there were

no witnesses to the accident, it is very difficult to identify where and how this accident occurred. The ALJ had the opportunity to observe claimant testify and found her to be credible. In a case as close as this one, that fact is enough to persuade the Board that claimant's version is close to the truth and claimant did not violate respondent's safety policy. The award of benefits by the ALJ is affirmed.

The ALJ split the impairment ratings of the treating physician, Dr. Melhorn and claimant's evaluating physician, Dr. Murati. However, the Board finds the opinion of Dr. Murati to be less credible than that of Dr. Melhorn. The medical notes of Dr. Melhorn document claimant's complaints and the healing process after the surgery. The mention of wrist involvement is minimal, with claimant failing to mention the wrist on several occasions. Dr. Murati found a significant cut going into claimant's forearm. Dr. Melhorn fails to mention such an injury at any time in his notes. Additionally, Dr. Murati's report of March 12, 2014, finds an accident which resulted in "right hand pain." He then rates the wrist and forearm, with little or no indication of permanent symptoms in the wrist and forearm. The Board finds the 12 percent functional impairment to the right hand from Dr. Melhorn to be the most credible opinion in this record. The award of the ALJ is modified accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 12 percent functional impairment to the right hand. Claimant has satisfied her burden that she did not recklessly violate respondent's workplace safety rules or regulations.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award Nunc Pro Tunc of Administrative Law Judge Ali N. Marchant dated April 13, 2015, is modified to award claimant a 12 percent functional impairment to the right hand. In all other regards the award is affirmed insofar as it does not contradict the findings and conclusions contained herein.

The claimant is entitled to 18.00 weeks of permanent partial disability compensation, at the rate of \$570.00 per week, in the amount of \$10,260.00 for a 12 percent loss of use of the right hand. The entire amount is due and owing and ordered paid at the time of this award, minus amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of August, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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